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Unilateral Promises: Scots Law Compared with the PECL and the DCFR*

Hector L. MacQueen**

Abstract: This contribution compares the recognition of a general concept of unilateral promises, binding without acceptance by the promisee, in Article 2:107 of the Principles of European Contract Law (PECL) and Article II.-1:103 of the Draft Common Frame of Reference (DCFR) with the equivalent Scottish rule. The significance of this comparison is that the rule in question is significantly wider than that found in most other European legal systems, which tend to recognize only limited categories of unilateral promises or to impose a requirement of acceptance. Despite an authoritative restatement of the law by Lord President Gill in *Regus (Maxim) Ltd* v. *Bank of Scotland plc* [2013] CSIH 12, the Scottish courts have generally approached the concept in a restricted and restrictive way, although at least occasionally allowing it a role even in commercial cases. The decision of the UK Supreme Court in the Scottish appeal *Royal Bank of Scotland* v. *Carlyle* [2015] UKSC 13 poses a significant challenge to such caution, and the judges' self-imposed restrictions are also inconsistent with the DCFR's approach. On the other hand, the Scottish experience suggests that the DCFR's requirement that notice of the promissory statement must reach the promisee to make it effective except when the statement is a public declaration may, in turn, be too demanding. It is also suggested, in opposition to a suggestion by Professor Martin Hogg, that from both the DCFR and the Scottish experience the conduct of the recipient after the statement is made may be relevant to the question of whether the statement can be treated as a binding promise.

Résumé: Cette contribution compare la reconnaissance d'un concept général de promesse unilatérale juridiquement contraignante indépendamment de l'acceptation du bénéficiaire, aux Articles 2: 107 PDEC et II.-1: 103 PCCR, avec la récente expérience écossaise d'une règle équivalente. L'intérêt de cette comparaison provient de ce que la règle en question a un domaine sensiblement plus étendu que celles connues de la plupart des autres systèmes juridiques européens, qui ont tendance à ne reconnaître que des catégories limitées de promesses unilatérales ou à exiger une acceptation du bénéficiaire. En dépit de la récente réaffirmation de la règle par le Lord President Gill dans l'arrêt *Regus (Maxim) Ltd v. Bank of Scotland plc* [2013] CSIH 12, les tribunaux écossais ont généralement interprété le concept d'une manière limitée et restrictive, même s'il a pu occasionnellement jouer un rôle en matière commerciale. La décision de la Cour suprême du Royaume-Uni dans l'affaire écossaise

* All URLs were last checked on 31 Jul. 2015. For ease of reference, citations of Scottish institutional writers are to the page numbers of the most recent editions or reprints rather than by the conventional book, title, and section. Scottish court decisions since 1998 may be accessed at http://www.scotcourts.gov.uk/ or at http://www.bailii.org/.

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Royal Bank of Scotland v. Carlyle [2015] UKSC 13 incite à remettre en cause cette circonspection, d'autant que les restrictions que s'imposent les juges sont également incompatibles avec l'approche retenue dans le PCCR. Néanmoins, l'expérience écossaise donne à penser que la règle posée dans le PCCR subordonnant l'efficacité de la promesse au fait qu'elle ait été portée à la connaissance du bénéficiaire, hors l'hypothèse d'une déclaration publique, pourrait être trop exigeante. En s'appuyant à la fois sur le PCCR et sur l'expérience écossaise, il est également suggéré, à l'encontre de la proposition du professeur Martin Hogg, que le comportement du bénéficiaire une fois qu'il a eu connaissance de la promesse peut être pertinent pour décider si celle-ci peut être considérée comme juridiquement contraignante.

Zusammenfassung: Dieser Beitrag vergleicht das in Article 2:107 PECL und Article II.-1:103 DCFR niedergelegte allgemeine Konzept von Versprechen, die ohne Annahme verbindlich sind, mit den jüngsten Erfahrungen mit einer entsprechenden Regel im schottischen Recht. Die Bedeutung des Vergleichs liegt darin, dass letztere Regel deutlich weiter geht als ihr Äquivalent in den meisten anderen europäischen Rechtssystemen, die nur begrenzte Kategorien einseitiger Zusagen anerkennen oder eine Annahme verlangen. Trotz einer autoritativen Neuformulierung des Rechts durch Lord President Gill in *Regus (Maxim) Ltd v. Bank of Scotland plc* [2013] CSIH 12 sind die schottischen Gerichte dem Konzept generell zurückhaltend gegenübergetreten, auch wenn sie es gelegentlich sogar in Handelssachen herangezogen haben. Die Entscheidung des UK Supreme Court in der schottischen Berufungssache *Royal Bank of Scotland v. Carlyle* [2015] UKSC 13 stellt diese Zurückhaltung in Frage, obwohl die von den Richtern selbst auferlegte Zurückhaltung auch mit dem Ansatz des DCFR nicht übereinstimmt. Andererseits legt die schottische Erfahrung nahe, dass die Anforderung des DCFR, wonach zur Wirksamkeit des Versprechens eine Mitteilung darüber dem Versprechensempfänger zugehen muss, sofern es nicht selbst in öffentlicher Mitteilung erfolgt ist, zu weitgehend sein könnte. Darüber hinaus schlägt der Beitrag unter Berücksichtigung des DCFR und der Erfahrung mit der schottischen Regel entgegen dem Vorschlag von Professor Martin Hogg vor, dass in der Beurteilung, ob das Versprechend als bindend anzusehen ist, das nachträgliche Verhalten des Versprechensempfängers zu berücksichtigen sein könnte.

I. Introduction

One of the happiest teaching experiences of my academic career was to stand in Arthur Hartkamp's shoes in the ancient university of Utrecht in the autumn of 1997 to deliver a Masters course on European Contract Law. I refer to Arthur's footwear only metaphorically, of course, and in any event, I was quite unworthy even to tie his laces when it came to the subject matter of the course. He was an impressive colleague on the Lando Commission for a European Contract Law (which I joined in 1995). Full of knowledge and erudition that was by no means limited to law, his experience included work on the new Dutch Civil Code (1992) and the then even newer Unidroit Principles of International Commercial Contracts (1994). As a tyro in such projects, I stood in awe of him and the many other similarly veteran proponents of codes, restatements, and conventions on the Lando Commission. However, the kindly welcome and encouragement that I

received has stayed with me as an example of how senior scholars should treat their juniors.

The subject of this tribute in Arthur's honour is not one on which I recall dwelling with my sixty or so Utrecht students in 1997. Although the Principles of European Contract Law (PECL), produced by the Lando Commission, already included a draft Article 2:107 that provided that 'a promise which is intended to be legally binding without acceptance is binding',[1] the handout for my seminar on the formation of contracts focused instead on the doctrine of offer and acceptance and the problem of the 'battle of the forms'. In that area, of course, the PECL provided that there might be a contract even if the offer and acceptance referred to conflicting general conditions of contract.[2] However, I do not think this departure from the standard doctrines of formation even took me to the further rule that the PECL rules on offer and acceptance applied, with appropriate modifications, even though the process of contract formation could not be analysed into offer and acceptance.[3] What I can now see, however, is that this meant that the PECL distinguished its promissory obligation from other contractual ones in a significant way, even if the Article on promise went on to say in its second sentence that the rules on contract applied to the former 'with appropriate adaptations'.

Comparative examination of Article 2:107 PECL would also have shown me that its rule was a quite striking innovation upon the position in most European jurisdictions. In the Netherlands, for example, there is recognition of unilateral promises as a type of offer, the acceptance of which by the offeree can be presumed unless the latter rejects it without delay.[4] The Italian Civil Code provides that a unilateral promise of performance is not binding, save in cases specifically provided for in the law, such as a promise to pay and acknowledge a debt, and promises to the public.[5] Reinhard Zimmermann has shown that German law 'does not recognize any general principle to the effect that unilateral promises are legally binding or can be'. Instead, it provides only for specific cases such as public promises of reward (*Auslobung*).[6] In French law, the *promesse unilatérale*

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1 This became Art. 2:107 PECL.

2 Article 2:209 PECL.

3 Article 2:211 PECL.

4 D. Busch, E. Hondius, H. van Kooten, H. Schelhaus & W. Schrama (eds), *The Principles of European Contract Law and Dutch Law: A Commentary* (The Hague/London/New York: Ars Aequi Libri, Nijmegen & Kluwer Law International 2002), pp 102–103.

5 *Codice Civile*, Arts 1987–1989.

6 R. Zimmermann, 'Vertrag und Verspechen: Deutsches Recht und Principles of European Contract im Vergleich', in S. Lorenz, A. Trunk, H. Eidenmüller, C. Wendehorst & J. Adolff (eds), *Festschrift für Andreas Heldrich zum 70. Geburtstag* (München: C H Beck 2005), pp 467–483 (quotation translated here at p 482).

de vente, i.e., the granting of an option to buy where acceptance by the beneficiary is not required, must be either notarially executed or registered on pain of nullity.[7] Article 1124 of the new French law on obligations declares that a unilateral promise is a contract by which the promisor agrees to provide a beneficiary with a right for a certain period of time to opt to conclude a contract of which the essential elements are already determined. The promisor cannot revoke the promise during the stipulated period, and any contract formed with a third party in violation of the promise is null if the third party knew of the promise's existence. It is clear that this Article provides an exception to an otherwise general rule that unilateral promises are not enforceable as such.[8] Finally, in English law, a unilateral promise is enforceable only if it is made in a written deed, or if the promisee has provided consideration in return for the benefit, whereby it becomes a contract the formation of which is analysed in terms of offer and acceptance, or if the circumstances are such as to give rise to promissory estoppel.[9]

It is therefore significant that the Draft Common Frame of Reference (DCFR), published in 2009, not only reaffirms the basic rule of Article 2:107 PECL but also elaborates further upon it. Article II.-1:103 DCFR (Binding effect) replaces the word 'promise' with the formula 'valid unilateral undertaking' but otherwise restates Article 2:107 PECL, emphasizing the lack of any need for acceptance to make the undertaking binding. Article II.-4:301 DCFR reinforces the earlier Article by spelling out the requirements for a unilateral juridical act, i.e., acts by a person having specific effects in law. These are that the actor intends to be legally bound or achieve the relevant legal effect, that the act is sufficiently certain, and that notice of the act reaches the person to whom it is addressed. Finally, if the act is addressed to the public, it must be made public 'by advertisement, public notice or otherwise'. Article II.-4:302 DCFR provides that the party's intention is to be determined from its statements or conduct as these

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7 B. Nicholas, *The French Law of Contract* (Oxford: Oxford University Press, 2nd edn 1992), pp 65–66; J. Gordley (ed.), *The Enforceability of Promises in European Contract Law* (Cambridge: Cambridge University Press 2002), p 280.

8 Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, accessible at http://www.justice.gouv.fr/. Note also B. Fauvarque-Cosson, 'Negotiation and Renegotiation: A French Perspective', in J. Cartwright, S. Vogenauer & S. Whittaker (eds), *Reforming the French Law of Obligations: Comparative Reflections on the Avant-projet de réforme du droit des obligations et de la prescription ('the Avant-projet Catala')* (Oxford and Portland, Oregon: Hart Publishing 2009), p (33) at 34 and 39.

9 E. Peel (ed.), *Treitel The Law of Contract* (London: Sweet & Maxwell/Thomson Reuters, 13th edn 2011), paras 3-012, 3-076-3-99, and 3-170–3-173.

were reasonably understood by the person to whom the act is addressed,[10] while, under Article II.-4:303 DCFR, that person may also reject its right or benefit from the act by notice to the other party, provided that this is done without undue delay. The Article slightly undermines the general non-requirement of acceptance by also saying that the right to reject may be lost if the person expressly or impliedly accepts the right or benefit. However, the effect of a successful rejection is that the right or benefit is treated as never having accrued.

The national notes to the DCFR Articles show further that, by and large, the new Civil Codes of the countries that joined the European Union in 2004 (Poland, Estonia, Slovenia, Slovakia, Hungary, Bulgaria, and the Czech Republic) have not followed the model of the general enforceability of unilateral promises or undertakings but instead recognize this only in cases specifically set out in the law (public promises, for example), or where the promise is an offer and the promisee's active acceptance is necessary to create a binding contract.[11] However, this does not mean that the PECL and the DCFR provisions on unilateral promises, binding without any acceptance by the promisee, are without parallel in European legal systems. The national notes to both texts state that Belgium, Scandinavian jurisdictions, and Scotland all recognize the general possibility that an obligation may be created unilaterally by a party making a promise or giving an undertaking, with no need for any act of acceptance by the beneficiary or promisee.

In assessing the value of these provisions, accordingly, it seems worthwhile to consider the experience of these jurisdictions that have such similar rules already in place. I must leave for another occasion or to another person better equipped to undertake the task the analysis of Belgium and the Scandinavian countries.[12] In Scotland, however, there has been a considerable amount of recent case law on unilateral promises, especially in commercial settings. While the courts have been reluctant to deploy the concept in that context in particular, there has been some confusion in their approach to the subject, which may be clarified by comparison with the DCFR. I will suggest that the most recent judicial decision, a 2015 case of the United Kingdom Supreme Court on an appeal from Scotland, points in the right direction, albeit that some procedural peculiarities of the case may serve initially to conceal its true significance.

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10 See also Art. II.-8:201 DCFR on the interpretation of unilateral juridical acts.

11 C. VON BAR & E. CLIVE (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) Full Edition [DCFR]* (Munich: Sellier, 6 vols 2009), vol. 1, pp 136–138.

12 There is nothing from Scandinavia in *Enforceability of Promises*, *supra* n. 7; but from the Belgian contribution by I. Corbisier, the law seems rather similar to French law (see index entry 'Belgium').

II. Unilateral Promises Binding Without Acceptance in Scots Law

The first Scottish jurist to distinguish between contract and unilateral promise as distinct categories (within the heading of what he called 'conventional obligations') was James Dalrymple, Viscount Stair (1619–1695). James Gordley has rightly grouped Stair among the 'northern natural lawyers' who also included Grotius and Pufendorf and who followed the late scholastics in seeing promises in general as binding in nature on the persons who made them, with the question then being how far positive law might square with that position.[13] In his *Institutions of the Law of Scotland*, first published in 1681, Stair began his account with the proposition that individual liberty – 'a natural faculty to do that which every man pleaseth, unless he be hindered by law or force' – was also 'the most native and delightful right of man, without which he is capable of no other right'.[14] Liberty was, however, not absolute; it was limited by, among other things, a person's 'own delinquence [in other words, wrongdoing] or consent', both of which could subject the person to obligations to others.[15] For Stair, 'conventional obligations do arise from our will and consent'.[16] By engaging with another in the appropriate fashion, a person could give up liberty and become subject to that other's power of exaction, 'whereby he may restrain, or constrain us to the doing or performing of that whereof we have given him power of exaction; as in the debtor, it is the debtor's duty or necessity to perform'.[17] However, Stair continued, 'it is not every act of the will that raiseth an obligation, or power of exaction . . . We must distinguish between three acts in the will, desire, resolution and engagement'.[18] Neither desire (a tendency or an inclination of the will towards its object) nor resolution (a determinate purpose to do that which is desired) was enough to create a right in another. To achieve a right, there had to be engagement (the conferral or statement of a power of exaction in another). Such engagement was possible by one person alone by way of a promise, with no requirement for any action by the promisee: 'the obligatory act of the will

13 See the following writings by J. Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon Press 1991), pp 71–77; 'Some Perennial Problems', in *Enforceability of Promises*, *supra* n. 7, pp 2–10; *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (Oxford: Oxford University Press 2006), Ch. 13; *The Jurists: A Critical History* (Oxford: Oxford University Press 2013), Ch. V. See also W. Decock, *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca. 1500–1650)* (Leiden and Boston: Martinus Nijhoff 2013), Ch. 3.3–5.

14 J. Dalrymple Viscount Stair, *The Institutions of the Law of Scotland* (2nd edn 1691; reprinted Edinburgh: Edinburgh University Press 1981), p 96.

15 *Ibid*., pp 96–99 (quotation at p 96).

16 *Ibid*., p 195.

17 *Ibid*., p 196.

18 *Ibid*., p 196.

is sometimes absolute and pure'.[19] A contract (or paction), on the other hand, is 'the consent of two or more parties to some things to be performed by either of them'; 'not a consent in their opinions, but a consent in their wills, to oblige any of them'.[20] Engagement could be expressed conditionally, such that either the obligation did not come into existence at all until the condition was fulfilled or that fulfilment of the condition made performance of an already existent obligation enforceable.[21] An example of the first situation was the offer, in which 'there is implied a condition, that before it become obligatory, the party to whom it is offered must accept'.[22] 'But', Stair went on, 'a promise is that which is simple and pure, and hath not implied as a condition, the acceptance of another'.[23] It is not thought that by this he meant to exclude the possibility of a conditional promise where the conditionality went to the enforceability (as distinct from the very existence) of an obligation; a point to which we will return.[24] Stair's final observation was that the promisee's renunciation of the promise was an act of that party's will, which was effective to void the right created by the promisor's action: 'not', he said, 'by the negative non-acceptance, but by the contrary rejection'.[25]

In his recognition of the promise binding without acceptance by the promisee, Stair noted that '[i]n this Grotius differeth'.[26] So did many other of the northern natural lawyers, before and after Stair's time. His position on the point was, however, followed by Scottish writers up to the middle of the eighteenth century.[27] John Erskine, Professor of Scots Law at Edinburgh University (1738–1765), was the first to introduce the idea of 'presumed acceptance', which

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19 *Ibid*., p 197.

20 *Ibid*., p 198.

21 *Ibid*., p 196.

22 *Ibid*.

23 *Ibid*., p 197.

24 See R. Zimmermann & P. Hellwege, 'Belohnungsversprechen: "*pollicitatio*", "promise" oder "offer"', in *Zeitschrift für Rechtsvergleichung* 1998, p (133) at 138–139, for the suggestion that when Stair referred to *pollicitatio* he meant promise *sub conditione*.

25 Stair, *supra* n. 14, p 197.

26 *Ibid*.

27 See W. Forbes, *The Institutes of the Law of Scotland 1722 and 1730* (reprinted and edited with an introduction by H. L. MacQueen, Edinburgh: Avizandum for Edinburgh Legal Education Trust, Old Studies in Scots Law 2012), vol. 3, p 192; W. Forbes, *A Great Body of the Law of Scotland* (unpublished MS of c.1720 in Glasgow University Library, accessible at http://forbes.gla.ac.uk/contents/), p 818; A. McDouall Lord Bankton, *Institute of the Laws of Scotland in Civil Rights with Observations upon the Agreement or Diversity between Them and the Laws of England in Four Books, after the General Method of the Viscount Stair's Institutions* (1751; reprinted Edinburgh: Stair Society 1993), vol. 41, pp (228–229) at 324; H. Home, Lord Kames, *Principles of Equity* (Edinburgh: 1760; Edinburgh: 3rd edn 1778, reprinted and edited with an introduction by M. Lobban; Indianapolis: Liberty Fund, Natural Law and Enlightenment Classics 2014), p 118 (also reprinted and edited with an introduction by D.J. Carr, Edinburgh: Avizandum for Edinburgh Legal Education Trust, Old Studies in Scots Law 2013), p 195.

thereafter held sway among Scottish jurists down to the middle of the twentieth century.[28] However, there was also powerful judicial support for Stair's approach as early as the mid-nineteenth century. His view of the law was expressly approved in 1864 by Lord Justice-Clerk Inglis (later Lord President of the Court of Session and probably the most influential Scottish judge of the period):

> A promise is a pure and simple expression of the will of the party undertaking the obligation, requiring no acceptance, and still less requiring mutual consent ... It appears to me that when a party, in terms of this letter, agrees to pay £100 he is making a promise, and that by the bare act of his will thus expressed he undertakes an obligation to pay, which requires no acceptance.[29]

It was, however, well into the second half of the twentieth century before the efforts of T. B. Smith (successively Professor of Scots Law at Aberdeen (1949–1958) and Professor of Civil, then Scots Law, at Edinburgh (1958–1972), and a Scottish Law Commissioner (1965–1980)) persuaded both other writers and the courts that a doctrine of presumed acceptance was of little utility in the analysis of unilateral promises.[30] So long as the promisee had the power to renounce the benefit of the promise, there was no need to manufacture an act of acceptance.[31] What seems likely to be the definitive judicial statement came from Lord President Gill in *Regus (Maxim) Ltd* v. *Bank of Scotland plc* in 2013:

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28 J. Erskine, *An Institute of the Law of Scotland 1st edition 1773* (reprinted and edited with an introduction by K. G.C. Reid, Edinburgh: Avizandum for Edinburgh Legal Education Trust, Old Studies in Scots Law 2014), p 483, and see further W.D.H. Sellar, 'Promise', in K. Reid & R. Zimmermann (eds), *A History of Private Law in Scotland* (Oxford: Oxford University Press 2000), vol. 2, p (252) at 271–272.

29 Macfarlane *v.* Johnston (1864) 2 M. 1210 (CSIH), p 1213, per Lord Justice-Clerk Inglis. See also the same judge in *Vallance* v. *Forbes* (1879) 6 R. 1099 (CSIH), p 1101.

30 See the following works of T.B. Smith: *A Short Commentary on the Law of Scotland* (Edinburgh: W Green & Son Ltd 1962), Ch. 32; *Studies Critical and Comparative* (Edinburgh: W Green & Son Ltd 1962), pp 168–182. Cf. *The Laws of Scotland: Stair Memorial Encyclopaedia* (henceforth *SME*), vol. 15 (Edinburgh: Butterworths for The Law Society of Scotland 1996), paras 611–618; W.W. McBryde, *The Law of Contract in Scotland* (Edinburgh: W Green & Son Ltd for the Scottish Universities Law Institute Ltd, 3rd edn 2007), Ch. 2; H.L. MacQueen & J. Thomson, *Contract Law in Scotland* (Haywards Heath: Bloomsbury Professional, 3rd edn 2012), paras 2.54–2.63. Differences of opinion between Smith and the English Law Commissioner L.C.B. Gower on whether a concept of unilateral promise needed legal recognition are among the reasons why the joint project of the English and Scottish Law Commissions to produce a contract code for the United Kingdom failed in 1973: see H.L. MacQueen, 'Glory with Gloag or the Stake with Stair? T B Smith and the Scots Law of Contract', in E. Reid & D.L. Carey Miller (eds), *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (Edinburgh: Edinburgh University Press 2005), p (138) at 159–160.

31 See however the discussion in McBryde, *supra* n. 30, paras 2.28–2.34.

> In my opinion, a promise in the law of Scotland is a unilateral juristic act. It acquires its binding force by reason of the declarant's expression of his will to be bound. . . . [B]ecause in Scots law a promise acquires its obligatory nature at the moment at which it is made, questions of acceptance and of actings in reliance on it are irrelevant.[32]

There are numerous instances, in Scots law, of obligations being held to come into existence without any acceptance by the offeree. Firm offers, under which an offeror promises not to exercise its power to revoke for a certain period of time, and third-party rights in contracts are long-established instances,[33] and one might add commitments made in invitations to treat or tender, such as that the highest bid will be accepted or that all tenders submitted on time will be considered under a particular process.[34] Many further examples are found in legal practice[35] and case law.[36] Options to purchase heritage (immovable property) contained in mutual writings embodying contracts between the parties, such as, for example, a lease of land under which the tenant is also granted an option to buy the land, have generally been held to confer a right upon the beneficiary without any need for acceptance.[37] In *Carmarthen Developments Ltd* v. *Pennington*, Lord Hodge said:

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32 *Regus (Maxim) Ltd* v. *Bank of Scotland plc* [2013] CSIH 12, 2013 SC 331 (hereafter *Regus (Maxim)*), paras 33–34.

33 McBryde, *supra* n. 30, paras 6.42, 10.07; J. A.K. Huntley & A.K. Dedouli, 'Third Party Rights, Promises and the Classification of Obligations', *Juridical Review* 2004, p (303) at pp 332–336.

34 Examples from non-Scottish cases include *Harvela Investments* v. *Royal Trust Company of Canada* [1986] AC 207; *Blackpool & Fylde Aero Club* v. *Blackpool Borough Council* [1990] 1 WLR 1995. On the latter situation, see also *Sidey Ltd* v. *Clackmannanshire Council* [2011] CSOH 194, 2012 SLT 334, as discussed in M. Hogg, 'Liability for Improperly Rejected Contract Tenders: Legitimate Expectations, Contract, Promise and Delict', *Edinburgh Law Review* 2012, p 246.

35 For example, solicitors' 'letters of obligation': see generally G.L. Gretton & K. G.C. Reid, *Conveyancing* (Edinburgh: W Green, 4th edn 2011), paras 2.10–2.11 and 9.25–9.28; A. Stewart, 'A New Era in Conveyancing: Advance Notices and the Land Registration etc (Scotland) Act 2012', in F. McCarthy, J. Chalmers & S. Bogle (eds), *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (Cambridge: Open Book Publishers 2015), Ch. 8.

36 See, for example, *Muirhead* v. *Gribben* 1983 SLT (Sh. Ct.) 102; *Lord Advocate* v. *Glasgow District Council* 1990 SLT 721 (CSIH); *Sim* v. *Howat* [2011] CSOH 115, para. 33 (liability of reconstituted partnership for old partnership's debts promissory, per Lord Hodge). Cf. *Smith* v. *Stuart* [2010] CSIH 29, 2010 SC 490.

37 *Sichi* v. *Biagi* 1946 SLT (Notes) 1; *Scott* v. *Morrison* 1979 SLT (Notes) 65; *Stone* v. *Macdonald* 1979 SC 363; *Miller* v. *Frame* 2002 SLT 459. All CSOH. Cf. *McDougall* v. *Heritage Hotels Ltd* [2008] CSOH 54, 2008 SLT 494.

> [M]ost arrangements which are described as options have certain effects. First, until the party to whom the option has been granted intimates his intention to exercise the option, he is under no obligation to purchase the option subjects. Secondly, once a contract or unilateral promise has created the option, the exercise of that option is the exercise of the right conferred by that contract or promise and not the acceptance of an offer. Thirdly, when the party in whose favour the option has been given intimates the exercise of that right he becomes bound to complete the contract by purchasing the subjects. Thus while the exercise of the option by the grantee brings into being bilateral obligations, that effect does not make the exercise of the option the acceptance of an offer.[38]

The option itself thus seems normally to be a unilateral promise to enter a contract of sale should the condition of the prospective purchaser's intimation of an intention to exercise the option be fulfilled. The formation of the actual contract of sale will be a separate juridical act of the contracting parties.

III. Defining Unilateral Promises

However, what exactly distinguishes a promise from an offer apart from the need for acceptance? Erskine explored the issue in terms of indicative language: 'words proper to express a present act of the will, such as, *I promise*, or *I oblige myself, to give*, or *make over in a present*'.[39] However, words by themselves cannot be enough. As Stair had earlier pointed out, in determining whether or not any voluntary obligation exists, 'it is much to be considered, whether the consent be given *animo obligandi*, to oblige or not'.[40] The same words may or may not be interpreted as obligatory, depending on the circumstances in which they are uttered and the speaker's intent, derived mostly (but not entirely) from an external perspective:

> [I]f it be jestingly or merrily expressed, whatsoever the words be, there is no obligation; because thereby it appears there is no mind to oblige; [but] if the words be in affairs or negotiations, they are interpreted obligatory, though they express no obligation but a futurition, which otherwise would import no more than a resolution; as Titius is to give Mevius an hundred crowns, in any matter of negotiation, this would be obligatory, but otherwise it would be no more but an expression of Titius' purpose so to do; yet because it is inward and unknown, it must be taken by the words or other signs, so if the words be

38 *Carmarthen Developments Ltd* v. *Pennington* [2008] CSOH 139, para. 15 (citations omitted).
39 Erskine, *supra* n. 28, p 482.
40 Stair, *supra* n. 14, p 198.

clearly obligatory and serious, no pretence that there was no purpose to oblige will take place.[41]

Stair's emphasis on 'affairs or negotiations', i.e., business dealings, as a context in which the necessary obligatory intention can be taken as a given is worth noting in the light of the apparently different approach in modern courts, to be discussed further below.[42]

Professor Martin Hogg of Edinburgh has recently defined a promise as a human institution (i.e., as opposed to one divinely pre-ordained): 'a statement by which one person commits to some future beneficial performance, or the beneficial withholding of a performance, in favour of another person'.[43] In Hogg's impressive and generally persuasive analysis, which draws on linguistic and philosophical as well as legal discussions, a promise is more than merely an internal process for the promisor.[44] The necessary external act or statement of the promisor may in general, however, be by way of 'spoken words, writing or behaviour (for instance, a nod of the head in response to a question asking whether a promise is intended)'.[45] It is thus possible to bring into account oral and other behavioural modes of promising (an important point for Scots law, which recognizes the possibility of an unwritten promise being effective).[46] A promise is, for Hogg, a commitment to performance by the promisor; not, for example, to the truth or otherwise of some statement about a natural phenomenon or the performance of some other person. The commitment must be more than illusory and not of something the promisor cannot fulfil or is very unlikely to be able to fulfil. It must relate to the future rather than some past event, although statements deploying the future tense ('I will', or 'I intend') are not by that fact alone to be regarded as promissory. The promisor's commitment must be in favour of another person. Promises fall to be distinguished from vows to a god or gods, and oaths by which a person reinforces a commitment by reference to a god or gods; neither of these necessarily involves a commitment to another person as recognized by law. Promises are also to be distinguished from threats, where the threatener's commitment is to harm rather than benefit another person. Hogg concludes that a statement is not to be characterized as promissory as a result of the effects it produces on other parties, such as detrimental reliance or trust. I will return to this point at the end of my paper.

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41 *Ibid.*

42 See text accompanying n.56.

43 M. Hogg, *Promises and Contract Law; Comparative Perspectives* (Cambridge: Cambridge University Press 2011), p 6.

44 *Ibid.*, pp 4–57.

45 *Ibid.*, p 10.

46 See further text accompanying n.58 and n.59 below.

IV. Testing the Definition in Court

The modern Scottish case law does not, on the whole, yield up many positive examples with which to test such attempts at definition. Most judicial decisions are against findings that a promise has been made, especially in a commercial context. In *Krupp Uhde GmbH* v. *Weir Westgarth Ltd*,[47] for example, the parties were members of a consortium construction project. W issued a letter to K, undertaking to transfer sums due as retention monies to a third party in the consortium. The sums were to be transferred to K in consideration of a loan made by K to the third party's parent company. W's letter was in the following terms:

> We confirm receipt of a letter . . . from [*the third party*] a copy of which is attached, requesting us to amend remittance instructions in respect of the two retention payments specified therein. We undertake that we shall comply with [*the third party's*] irrevocable instructions therein and on the terms and conditions specified in the said letter.

The question was whether this undertaking by W amounted to a unilateral promise to K to pay the sums mentioned in the earlier letter, or whether, along with that earlier letter, it amounted to no more than an assignation (assignment) by the third party of its claims to the retention monies coupled with a non-binding confirmation of W's intention to make payment of these monies. The court preferred the latter approach. The parties had not had any commercial contact before W's letter was issued to K, and adoption of the promise analysis would, in effect, be to make W guarantors of the third party's debt to K. Such an unusual obligation had to be spelled out with clarity, given the lack of prior dealings between the parties, and the language of W's letter was at best ambiguous.

In *Ballast plc* v. *Laurieston Properties Ltd*, a statement by a party (A) in a complex building project that payment of an outstanding sum 'will' be made directly into the account of another party (B) on a particular date and that all future payments thereafter will be paid directly from A's account, when previously payments had been made from the account of yet another party (C), was held to be merely one advising of a change in payment mechanism and not a binding undertaking to make all the payments falling due to B in the project.[48] Referring to Erskine's passage about obligatory words, Lady Paton observed:

> I am unable to accept the proposition that the word 'will' necessarily connotes the undertaking of a legally enforceable obligation. It may do, depending on

47 Summarized at 2002 GWD 19-620, accessible in full online at http://www.scotcourts.gov.uk/search-judgments/judgment?id=df3287a6-8980-69d2-b500-ff0000d74aa7.

48 *Ballast plc* v. *Laurieston Properties Ltd* [2005] CSOH 16.

> the context and the circumstances: . . . But having heard all the evidence in the present case I am not persuaded that the use of the future tense in relation to a description of the source of future payments has a legally binding effect.[49]

The question in *Countess of Cawdor* v. *Earl of Cawdor*[50] was whether or not the defenders (the Earl and others, acting as trustees of the 'Number 1' trust scheme) had intended to make a unilateral promise to transfer certain pension fund assets to the pursuers (the Dowager Lady Cawdor and others, acting as trustees of the 'Number 2' trust scheme). The pursuers alleged that such a promise had been made by the Number 1 trustees at a meeting of its board, after which some assets were transferred to the Number 2 trustees but not the complete amount expected. The First Division of the Court of Session had to consider whether a minute of the meeting, not delivered to any other party, setting out that the trustees had 'after due consideration decided that they would comply with Lord and Lady Cawdor's requests for transfer payments', amounted to a unilateral promise in favour of the Number 2 trustees. Giving the leading opinion, Lord President Hamilton thought not. Citing Stair's analysis of desire, resolution, and engagement, he commented:

> In my view, although this was a formal meeting at which the trustees proceeded on the basis of professional advice, they went no further than the stage of 'resolution' referred to by Stair. They 'decided' that they 'would comply' with Lord and Lady Cawdor's requests for a transfer payment . . . The circumstance that the meeting was not followed by a communication with the No. 2 Scheme trustees tends also to support the proposition that it was not intended that the decision taken at the meeting should of itself give rise to an obligation to them.[51]

What seems to have been crucial in the *Cawdor* case, therefore, was the absence of communication of the alleged promise to the promisee, which negatived the presence of the necessary intention of the promisor to be bound. Lord Hamilton also remarked that 'the presence or absence of communication to the other party may be an adminicle of evidence in the question whether the statement amounts to a promise in law'.[52]

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49 *Ibid.*, para. 147.

50 [2007] CSIH 3, 2007 SC 285.

51 *Ibid.*, para. 15.

52 *Ibid.*, para. 15. See also *MacDonald* v. *Moir's Executrix* [2015] CSOH 101, para. 31 (per Lord Tyre).

In *Van Klaveren* v. *Servisair UK Ltd*,[53] statements accepting liability to the party to whom they were addressed were held not to amount to a binding undertaking to pay damages in satisfaction of that liability, because extrajudicial admissions of liability are generally revocable and thus distinct from binding unilateral undertakings. The court did state, however, that it is possible in Scots law to undertake a unilateral obligation not to contest liability.

Lord Gill in his *Regus (Maxim)* opinion cited Stair and the *Cawdor* case as authority on how to determine whether a statement was a promise:

> Since any promissory obligation is intention-based, the court's task is to consider whether the evidence, objectively assessed, discloses an intention on the part of the alleged promisor to incur a legally binding engagement . . . [citations omitted]. That question, in my view, is to be decided on a consideration of the alleged promisor's own words. Bearing in mind the stringent consequences of a valid promise that I have described, I consider that a promise is binding only if the promisor's own words are clear and unambiguous.[54]

Under that approach, there was held to be no promise in a bank's written 'confirmation' to the tenant of a commercial development that 'we hold [a] sum of £913,172 to meet the landlord's commitment to fit-out costs', which 'funds will be released in accordance with the drawdown procedures agreed between the parties'.

V. Some Comments on the Court's Approach

While it goes too far to suggest that there is a presumption against a unilateral statement being taken as a promise, akin to the presumption against donation already recognized in Scots law,[55] judicial reluctance to accept that there may be unilateral obligations in a commercial setting is very apparent. The reasons for this have to be inferred but at least one strong possibility is doubt as to whether it is at all likely that one business party would undertake to do something for nothing for another. In *Regus (Maxim)*, for example, Lord Gill spoke of 'an initial improbability that a bank, whose normal obligations are owed to its customer,

53 *Van Klaveren* v. *Servisair UK Ltd* [2009] CSIH 37, 2009 SLT 576.

54 [2013] CSIH 12, 2013 SC 331, para. 36.

55 Cf. G. Black (ed.), *Woolman on Contract* (Edinburgh: W Green & Son Ltd, 5th edn 2014), para. 4.04 (presumption in favour of contract rather than promise). For a possible example, see *Wylie* v. *Grosset* [2011] CSOH 89, 2011 SLT 609. For the presumption against donation in Scots law, see Lord Eassie & H. L. MacQueen (eds), *Gloag & Henderson: The Law of Scotland* (Edinburgh: W Green, 13th edn 2012), para. 13.28.

should choose to make a binding promise in favour of a third party'.[56] Yet that doubt (which, as already noted, would not have been shared by Stair)[57] is inconsistent with the policy to be seen in the 1995 legislation setting out a general requirement that promises must be in formal writing to be effective but making an exception for promises made in the course of business.[58] Such promises may therefore be made in informal writing(in other words, writing not subscribed by the promisor), orally, or indeed by appropriate conduct. The legislative aim was to meet concerns that a number of unilateral undertakings commonly in use by businesses of various kinds would otherwise be invalidated.[59] In other contexts, Scottish courts have often referred to the need to avoid putting artificial hurdles in the way of perfectly intelligible commercial activity,[60] and to be suspicious of the possibility of a business making a unilateral promise may be to do just the opposite.

Further, it is not obvious why an alleged unilateral promise must be in clear and unambiguous words to receive any effect. If lack of clarity or ambiguity in wording in a bilateral or multilateral commercial transaction were to mean no contract, there might be quite serious damage to the economy. Lord Gill's more considered approach in *Regus (Maxim)* seems preferable:

> It may be that the meaning of the promisor's words will be clear if they derive their meaning from the relevant factual background known to both parties. . . . [I]n a commercial context, the words of an alleged promise should be interpreted in the same way as any other alleged commercial obligation would be. . . . [That is], objectively on the basis of what a reasonable recipient with knowledge of the background would have understood by the documents in question.[61]

In essence, clarity should not have to leap from the page or the exact words of the promise; it may instead emerge through the process of interpretation.[62] It is also significant that Lord Gill, like the DCFR, recognizes that the interpretive process should consider what the reasonable addressee would have understood the

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56 *Regus (Maxim)*, *supra* n. 32, para. 42.

57 See text accompanying n.41 and n.42.

58 Requirements of Writing (Scotland) Act 1995, s. 1(2)(a)(ii).

59 *Report on Requirements of Writing* (Edinburgh: HMSO, Scot Law Com No. 112, 1988), paras 2.23–2.24.

60 See, e.g., *R & J Dempster Ltd* v. *Motherwell Bridge and Engineering Co. Ltd* 1964 SC 308, p 332 per Lord Guthrie (CSIH).

61 *Regus (Maxim)*, *supra* n. 32, para. 38.

62 The Scottish approach to interpretation is, however, narrower than that in Arts II.-8:101–8:202 DCFR: see *Scottish Law Commission Discussion Paper No. 147 on Interpretation of Contract* (Edinburgh: HMSO 2011).

statement to mean.[63] A relevant difference between promise and contract is that with the latter the court is necessarily seeking a common (and therefore artificial) intention of the parties in the wording used, while with the former the goal is determining the intention of the promisor. That cannot be judged subjectively on either side of the undertaking, but an objective standard can come from the perspective of the reasonable promisee.[64]

VI. Promises Subject to Suspensive or Resolutive Conditions

At first blush, the finding in *Van Klaveren* v. *Servisair UK Ltd* that the revocable character of a statement necessarily meant no promise seems obvious. Professor Hogg also gives the example of a promise to pay next Monday if the promisor has not changed her mind by then, where the highly subjective nature of the condition effectively undermines the notion of any promissory commitment.[65] However, he goes on to suggest that a promise to pay by a certain date in the more distant future subject to the promisor retaining a power to revoke should the changing nature of its relationship with the promisee so warrant 'is not so sweeping as to be suggestive of a lack of an original intention to be bound at all'; the example 'might be argued to be a permissible condition' rather than a negation of any promise.[66] Further, the idea that if a promisee fulfils the suspensive conditions necessary to enforce its right before any resolutive condition occurs is familiar in the Scots law of third-party rights in contract, and there seems no reason why it should not apply also to simple unilateral promises.[67]

The common example of the promise subject to a suspensive condition is the public promise of a reward on the occurrence of an uncertain future event: for example, finding and returning the promisor's lost dog or cat. Another crucial point in such cases is highlighted by Lord Gill in the *Regus (Maxim)* case: '[The promise] is binding even though it is not known to the promisee. If it is conditional, it will become binding if the condition is fulfilled, even though the promisee did not know of the original promise'.[68]

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63 See text accompanying n.10.

64 DCFR, vol. 1, p 572.

65 Hogg, *supra* n. 43, pp 30–35.

66 *Ibid.*, pp 33–34. See *Kinch Ltd* v. *Adams* [2015] SCGLA 8, 2015 GWD 5-105, for a possible example.

67 See *Love* v. *Amalgamated Society of Lithographic Printers of Great Britain and Ireland* 1912 SC 1078; *Kelly* v. *Cornhill Insurance Co. Ltd* 1964 SC (HL) 46. The cases are discussed in *Scottish Law Commission Discussion Paper No. 157 on Third Party Rights in Contract* (Edinburgh: HMSO 2014), paras 2.70–2.78. For conditions in the DCFR, see its Art. III.-1:106.

68 *Regus (Maxim)*, *supra* n. 32, para. 34. A possible example is *Petrie* v. *Earl of Airlie* (1834) 13 S. 38.

A promisee must, of course, be in existence and aware of the promise at the time when enforcement of the obligation is sought, but that does not preclude the promisor being bound at an earlier stage.[69] Thus, a binding promise can be made in favour of a person who is unaware of it (as in the example above of the finder of the lost cat, who hands it in at the police station, unaware that its owner has promised a reward to the finder), or who is unable to understand or appreciate its significance (a baby or an incapable adult), or who is not yet in existence when the promise is made (e.g., an unborn child or a company not yet incorporated). It is thought, however, that in the case of the promisee not in existence at the time the promise is made there is no obligation at all until the suspensive condition of existence is fulfilled; before then, the promisor has the power to withdraw.[70]

A further implication of the conditional promise's binding quality is that, as Lord Gill remarked, communication of it to the promisee is not always required, nor delivery of the relevant document to the creditor where the promise is in writing, which is otherwise a general requirement of Scots law with regard to the effectiveness of written obligations.[71] As remarked in the *Cawdor* case, however, communication or delivery (where it occurs) can be important evidence of the promisor's concluded intention to be bound. However, it is not clear that Scots law in this area is exactly the same as the DCFR, where notice to the addressee is required for an effective unilateral juridical act unless it is addressed to the public, in which case it must be made public in appropriate fashion.[72] It would also seem to follow that the promise need not be directly addressed to the promisee. A significant element in the *Regus (Maxim)* decision that no promise had been made by the bank was that the relevant letter was addressed to the landlord's solicitors, not the tenant, and was in fact a copy of a letter that had been used a year earlier in relation to another lease in the same development. However, the letter's addressee may not have been quite as decisive a fact as the

69 Note too in this context Lord Gill's comment that '[W]here the promise is made subject to a condition requiring action by the promisee, the fulfilment of the condition does not convert the promise into a contract *ex post facto*. The late Sir Thomas Smith pointed out that the distinction between a conditional promise and a conditional offer may be narrow . . . but in my view it is a material and significant distinction nonetheless' (*Regus (Maxim)*, *supra* n. 32, para. 35 (citing T.B. Smith, '*Pollicitatio* – Promise and Offer', *Acta Juridica* 1958, p (141) at 148–150).

70 See Erskine, *An Institute*, *supra* n. 28, p 413. Note also W.M. Gloag, *The Law of Contract* (Edinburgh: W Green & Son Ltd, 2nd edn 1929), p 4 ('Obligations in Favour of Non-existing Party'); D.N. MacCormick, 'General Legal Concepts Reissue', in *SME*, *supra* n. 30, para. 73.

71 See generally McBryde, *supra* n. 30, Ch. 4. See further Act 1995, *supra* n. 58, s. 9F, and Legal Writings (Counterparts and Delivery) (Scotland) Act 2015, s. 4.

72 Article II.-4:301(c) DCFR.

court seems to have thought against the possibility that a promise was being made in this indirect fashion.[73]

VII. *Royal Bank of Scotland* v. *Carlyle*

None of the foregoing comments is meant to suggest that any of the cases was wrongly decided. The judges involved were in a much better position than any commentator to take a conclusive view of the whole of the material before them. They contrast significantly, however, with the final case for discussion: the March 2015 decision of the UK Supreme Court in *Royal Bank of Scotland* v. *Carlyle*.[74] It is yet another case about the financing of commercial activity, but this time the argument that the bank's commitment to a business person was obligatory was successful. The case arose from a transaction between the bank (henceforth RBS) and a property developer (Mr Carlyle, henceforth C) that began to be negotiated early in 2007. The facts were largely undisputed. C's business model as a property developer was to buy a plot of land, build house(s) there in which he then lived briefly, before selling at a profit and moving on to his next project. In the vibrant property market prevailing in Scotland before the credit crunch began in July 2007, leading on to the financial crash in 2008, C's business was a very successful one. He had regular dealings with RBS under which the bank made loans to him, secured on the properties they were used to acquire. The bank would also make separate finance available to cover C's development costs on the property.

At the beginning of 2007, C became aware of an opportunity to buy a plot of land being offered for sale in Gleneagles (an estate in the very attractive Perthshire countryside, also famous for its five-star hotel and three championship golf courses, one of which was to host the Ryder Cup competition in the autumn of 2011). Under the prospective deal, C would build two houses on the plot. These had to be completed by 31 March 2011 or the vendor would be entitled to buy back the land at the original sale price (there was concern that the sight of uncompleted houses around the golf course would be bad for TV coverage of the Ryder Cup). C deferred completion of the purchase while he also negotiated with RBS over the finance he would need. RBS was willing to make the loan funding, but it remained unclear for a long time whether it was also willing to provide the development costs funding. Throughout these discussions, C made it clear that he would not take the loan funding without development funding of up to GBP 700,000 also being in place. On 14 June 2007, the RBS representative placed a

73 *Regus (Maxim)*, *supra* n. 32, para. 43.

74 *Royal Bank of Scotland* v. *Carlyle* [2015] UKSC 13, 2015 SC (UKSC) 93 (hereafter *Carlyle* (Supreme Court)).

phone call to C and, with reference to the development funding application, said to him: 'You'll be pleased to know it's all approved, Edinburgh are going for it for both houses'. This was the key statement for consideration in the later litigation between RBS and C, although there was also evidence from RBS managers that C was told on several other occasions that development costs funding would be advanced. In August 2007, RBS lent C GBP 1.4 million to buy the land, repayable twelve months later. The contracts were put in writing, but no written confirmation was ever made with regard to the development funding of up to GBP 700,000. C was unworried by this as, previously, completion of development-funding formalities had generally followed some time after the loan agreements had been executed. He went ahead with his purchase of the land and began the development. A year later, with the loan funding due for repayment, the financial crisis had engulfed RBS (which was effectively nationalized, or 'bailed out' by the UK Government in October 2008). C failed to pay on time, arguing that he was entitled to withhold his payment because RBS was in breach of its obligation to provide development costs funding. The bank raised an action of payment against C and also succeeded in having him declared bankrupt.

The case thus turned on the significance in law of the telephonic statement made by RBS in June 2007. At first instance, it was argued for C that the statement was a 'collateral warranty'.[75] It may be that his lawyers avoided reference to unilateral promise because arguments based on that concept had had so little traction with the court in the recent past. The key words – 'You'll be pleased to know it's all approved, Edinburgh are going for it for both houses' – could hardly be said to be clearly promissory in nature. In any event, only English cases were cited to the court on collateral warranties.[76] From these, it might be inferred that the basic idea is one of oral representations made by one party to another, both of whom are also parties to a separate written contract, with the representor being liable in damages for the untruth of its representation if that induced the representee to enter the written contract. The approach was therefore one of characterizing the telephone statement as an untrue statement by RBS about its intentions regarding the development costs funding that had induced C to enter the written loan agreements and, indeed, the contract to buy the land at Gleneagles.

Lord Glennie at first instance emphasized that 'there is no magic in a collateral warranty . . . It is simply a contract, usually oral, which is collateral or

75 *Royal Bank of Scotland* v. *Carlyle* [2010] CSOH 3 (hereafter *Carlyle* (Outer House)).

76 These were *Heilbut Symons & Co.* v. *Buckleton* [1913] AC 30 (HL); *Dick Bentley Productions Ltd* v. *Harold Smith (Motors) Ltd* [1965] 1 WLR 623 (CA); *J Evans & Son (Portsmouth) Ltd* v. *Andrea Merzario Ltd* [1976] 1 WLR 1078; *Esso Petroleum Co. Ltd* v. *Mardon* [1976] 1 QB 801 (CA); and *Inntrepreneur Pub Co. (GL)* v. *East Crown Ltd* [2000] 2 Lloyd's Rep 611.

ancillary to another contract (the principal contract) between the same parties'.[77] However, he also talked about a 'representation or promise made by one party to the other, which . . . is intended to have binding effect (notwithstanding that it is not included in the terms of the principal contract'.[78] He held that the telephonic statement, 'viewed objectively in the context of what had gone on before', committed RBS to providing the development costs funding.[79] C's reliance upon the statement in entering the loan contracts was clear from the respective timings. The promise, as Lord Glennie was calling the statement by this point in his opinion, was sufficiently certain to be enforced: 'The amount of the advance sought was set out in the initial proposals submitted to the Bank. It was GBP 700,000 then, and it never changed. Whether it would all be taken up would depend on progress in the sale of other properties, but that does not affect the principle'.[80]

On appeal, the Second Division of the Court of Session reversed Lord Glennie's decision and held in favour of RBS.[81] In reaching this conclusion, the court made much more extensive use than Lord Glennie of Scottish authority and concepts, clearly including that of unilateral promise. However, the fundamental reason for the decision is a perception that the meaning C sought to give the telephone statement was 'somewhat improbable . . . major banks do not normally lend private individuals (or companies) millions of pounds . . . without setting out the terms and conditions of such a facility in writing'.[82] C knew from the previous course of dealing with RBS that the development costs funding would be the subject of a written agreement. All that had taken place on the telephone, therefore, was a statement of future intention, with the creation of obligations to come later when a formal agreement was executed. The statement may well have been truthful as to the bank's intention when made, with a change of mind coming only later: '[t]hat', said the court, 'may have been contrary to the spirit of the negotiations prior to the signing of the written agreements [of loan], but that spirit, or its moral content, cannot be taken as creating a legally binding voluntary obligation'.[83]

In the Supreme Court, however, Lord Glennie's decision was reinstated.[84] This was primarily because the Court thought that the Second Division had

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77 *Carlyle* (Outer House), *supra* n. 75, para. 37. Written undertakings generally known as 'collateral warranties' are familiar in Scottish as in English construction law practice: see *Scottish Law Commission Discussion Paper No. 157*, *supra* n. 67, paras 3.20–3.28.

78 *Carlyle* (Outer House), *supra* n. 75, para. 37.

79 *Ibid.*, para. 40.

80 *Ibid.*, para. 42.

81 *Royal Bank of Scotland* v. *Carlyle* [2013] CSIH 75, 2014 SC 188.

82 *Ibid.*, para. 60.

83 *Ibid.*, para. 63.

84 *Carlyle* (Supreme Court), *supra* n. 74.

overstepped its appellate function in reviewing Lord Glennie's findings of fact and drawing different conclusions on them. There is, accordingly, relatively little in the single judgment delivered by Lord Hodge on the proper legal characterization of the telephonic statement, but what is there is telling. He rightly said that the use of the term 'collateral warranty' in the lower courts had been a 'distraction … [e]ither "promise" or "unilateral undertaking" would have been a suitable choice of words for the independent legal obligation which Mr Carlyle was asserting'.[85] He might also have noted that, the bank having given the undertaking in the course of business, the requirement of formal writing did not apply – but he did not do so.[86] Although Lord Hodge thought that, had he been deciding the case at first instance, he might have shared the Second Division's view that the statement was the communication of a 'decision in principle' so that further steps were required to create an obligation on RBS with regard to development costs funding,[87] he did also note Scottish authority to the effect that parties' informal arrangements may bind them even if they also intend to put those arrangements on a formal written footing later.[88] On the Division's suggestion that such a way of proceeding on the part of a bank was improbable, Lord Hodge drily noted that 'it is notorious that the prudence which historically has been attributed to Scottish bankers was not always in evidence in commercial and mortgage lending in the years leading up to the financial crisis in 2008'.[89] His quotation from the New Zealand Court of Appeal's judgment in *Fletcher Challenge Energy Ltd* v. *Electricity Corporation of New Zealand Ltd* was also significant as an implicit rejection of the Scottish courts' previous narrow approach requiring 'clear words' for a unilateral promise:

> The court has an entirely neutral approach when determining whether the parties intended to enter into a contract. Having decided that they had that intention, however, the Court's attitude will change. It will then do its best to give effect to their intention and, if at all possible, to uphold the contract despite any omissions or ambiguities.[90]

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85 *Ibid*., para. 33. Note here Lord Hodge's earlier use of the concept of promise when still in the Court of Session in *Sim* v. *Howat*, *supra* n. 36.

86 See above text accompanying n.58.

87 *Carlyle* (Supreme Court), *supra* n. 74, para. 20.

88 *Ibid*., para. 25 (citing *Stobo Ltd* v. *Morrisons (Gowns) Ltd* 1949 SC 184 [CSIH]).

89 *Carlyle* (Supreme Court), *supra* n. 74, para. 26. For a highly critical account of RBS's small business lending practices before the financial crisis, see Ian Fraser, *Shredded: Inside RBS: The Bank that Broke Britain* (Edinburgh: Birlinn 2014), pp 376–383.

90 *Fletcher Challenge Energy Ltd* v. *Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433, para. 58, quoted *Carlyle* (Supreme Court), *supra* n. 74, para. 29.

This is reinforced as such by Lord Hodge's own further observation: 'As in the formation of other contracts the court applies an objective test, asking what a reasonable outside observer would infer from all the circumstances'.[91] However, this does differ from the perspective of the 'reasonable recipient' favoured by Lord Gill in *Regus (Maxim)* and the DCFR. For reasons already indicated, the latter approach may be preferable for unilateral promises,[92] but in practice, there may be little difference in result. In any event, the *Carlyle* case well illustrates how words may take on a promissory character when understood in the context in which they came to be uttered. A final, related point arises from Martin Hogg's previously noted comment that the detrimental reliance, or trust, of the addressee does not of itself convert a statement into a promise.[93] While this is in general true, the addressee's reaction to a statement must be part of the material falling to be considered in determining how the reasonable recipient would have understood it. C's understanding of and trust in what was said to him on the telephone sprang primarily from the undisputed evidence of what took place between him and the bank before the call, but his actions afterwards were an important confirmation of that understanding and his faith in what the bank would do thereafter. Further, had the promise been one that required formal writing under the 1995 Act, C would still have been permitted to prove it and to refer to his subsequent detrimental actions, known to and permitted by the promisor, to have it held enforceable against the latter.[94] It would seem odd to preclude such reference when the alleged promise did not have to be formally written.

VIII. Conclusion

While, in the main, recent Scottish experience with a general concept of unilateral promises binding without acceptance by the promisee does not suggest, as a consequence, a tsunami of unpredictable liabilities, it does seem that, at least sometimes, it could play a role even in commercial cases. However, there may not be enough here to persuade other systems, recognizing only a limited number of special cases of unilateral promises or having some requirement of acceptance over and above the promise, to change their position to something more akin to that found in the DCFR. Scots law itself is unlikely to abandon its requirement of formal writing in relation to unilateral promises, which has no equivalent in the DCFR. It may also raise a question about the DCFR's requirement that notice of the promise must reach the addressee to be effective except when it is a public declaration. However, the *Carlyle* case, properly understood, should make the

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91 *Ibid*., para. 35.

92 See text accompanying n.63 and n.64.

93 See specifically Hogg, *Promises*, *supra* n. 43, p 25.

94 Requirements of Writing (Scotland) Act 1995, s. 1(3), (4).

Scottish courts rethink their 'clear and unambiguous words' test in favour of something like the DCFR's more open but still objective and demanding test of what the reasonable recipient of the statement would have understood by it. The DCFR, at least, is clear that the subsequent conduct of the parties is a relevant consideration in the interpretation of the statement. This may go further than present Scots law in general,[95] but it is worthy of note that the promisee's subsequent conduct can be used to uphold the promisor's obligation when it should have been but was not, in formal writing.

95 See *Scottish Law Commission Discussion Paper No. 147*, *supra* n. 62, paras 5.21–5.22.

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